

STATE OF NEW YORK

DIVISION OF TAX APPEALS

---

In the Matter of the Petition	:	
of	:	
<b>IRWIN GOODFRIEND</b>	:	<b>DETERMINATION</b>
	:	<b>DTA NO. 813674</b>
for Redetermination of Deficiencies or for	:	
Refund of New York State and New York City	:	
Income Taxes under Article 22 of the Tax Law	:	
and the Administrative Code of the City of New	:	
York for the Periods December 1, 1989 through	:	
December 31, 1989 and June 16, 1990 through	:	
June 30, 1990, and for Revision of	:	
Determinations or for Refund of Sales and Use	:	
Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods June 1, 1990 through	:	
August 31, 1990 and December 1, 1990 through	:	
August 31, 1991.	:	

---

Petitioner, Irwin Goodfriend, 37 Hewitt Avenue, Bronxville, New York 10708, filed a petition for redetermination of deficiencies or for refund of New York State and New York City income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the periods December 1, 1989 through December 31, 1989 and June 16, 1990 through June 30, 1990, and for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1990 through August 31, 1990 and December 1, 1990 through August 31, 1991.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 13, 1995 at 1:00 P.M., with all briefs to be submitted by July 25, 1996, which date began the six-month period for the issuance of this determination. Petitioner appeared by Kostelanetz and Fink, LLP (Kevin M. Flynn, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (David C. Gannon, Esq., of counsel).

## ***ISSUES***

I. Whether petitioner is a person required to collect and pay over withholding taxes due from 305 Restaurant Corp. within the meaning of Tax Law § 685(g) and (n) for the periods December 1, 1989 through December 31, 1989 and June 16, 1990 through June 30, 1990.

II. Whether petitioner was a person responsible to collect and remit sales taxes on behalf of 305 Restaurant Corp. for the periods June 1, 1990 through August 31, 1990, and December 1, 1990 through August 31, 1991.<sup>1</sup>

## ***FINDINGS OF FACT***

1. On August 5, 1993, the Division of Taxation (the "Division") issued to petitioner, Irwin Goodfriend, a Notice of Deficiency (L-007736454-9) for withholding tax penalties under Tax Law § 685(g) in the amount of \$15,799.00 for the period December 1, 1989 through December 31, 1989.

On the same date, the Division also issued to petitioner a Notice of Deficiency (L-007736453-1) for withholding tax penalties under Tax Law § 685(g) in the amount of \$7,762.00 for the period June 16, 1990 through June 30, 1990.

Each of the notices stated that petitioner was personally liable "as an officer/responsible person for a penalty in an amount equal to the tax not paid by" 305 Restaurant Corp.

2. On August 5, 1993, the Division issued to petitioner four notices of determination of sales and use taxes due as follows: (1) Assessment No. L-007736263-8 for the period March 1, 1991 through May 31, 1991 for penalty due in the amount of \$50.00 and zero tax and interest, for a total amount due of \$50.00; (2) Assessment No. L-007736264-7 for the period December 1, 1990 through February 28, 1991 for penalty due in the amount of \$50.00 and zero tax and interest, for a total amount of \$50.00; (3) Assessment No. L-007736265-6 for the period June 1, 1991 through August 31, 1991 for penalty due in the amount of \$50.00 and zero tax and

---

<sup>1</sup>At the hearing, petitioner's representative raised an additional issue of whether petitioner, assuming he is determined to be responsible for the unpaid sales taxes, would be liable for penalties and interest. Mr. Flynn stated that this issue would be addressed in petitioner's brief. However, this issue was not addressed in either petitioner's brief or his reply brief. Therefore, it is deemed that petitioner has abandoned this issue.

interest, for a total amount due of \$50.00; and (4) Assessment No. L-007736266-5 for the period June 1, 1990 through August 31, 1990 for tax due in the amount of \$17,606.04, penalty due of \$5,281.80 and interest due of \$7,249.04, for a total amount due of \$30,136.88.

Each of the notices stated that petitioner was personally liable as an officer/responsible person of 305 Restaurant Corp. under Tax Law §§ 1131(1) and 1133(a) for taxes determined to be due in accordance with Tax Law § 1138(a).

3. After a conciliation conference, the conferee issued a Conciliation Order (CMS No. 134283), dated December 30, 1994, sustaining the statutory notices -- notices of deficiency numbers L007736453 and L007736454.

The conferee issued a Conciliation Order (CMS No. 134383), dated December 30, 1994, which sustained statutory notices of determination numbers L007736264 and L007736266. On the same date, the conferee also issued a Conciliation Order (CMS No. 133996) which sustained statutory notices of determination numbers L007736263 and L007736265.

4. Petitioner filed a petition, dated March 16, 1995, which requested (1) redetermination of the deficiencies of withholding tax penalties for the periods December 1, 1989 through December 31, 1989 and June 16, 1990 through June 30, 1990 in the total amount of \$23,561.00, and (2) revision of the determinations of sales and use taxes for the periods June 1, 1990 through August 31, 1990 and December 1, 1990 through August 31, 1991 in the total amount of \$30,286.80.<sup>2</sup> The petition stated that the Division erred in determining: (1) that petitioner was a "so-called 'responsible person' under the Tax Law for sales and withholding tax allegedly not paid by 305 Restaurant Corporation; (2) that petitioner was a person in charge of the financial affairs of the corporation; (3) that petitioner willfully failed to collect and remit sales and withholding tax to the Division; and that (4) petitioner was liable for penalties and interest with respect to the alleged unpaid sales and withholding tax. The petition further asserts, inter alia, that: (1) petitioner was not a responsible person for the corporation's sales and withholding tax; (2) another individual, not petitioner, was in charge of the financial affairs of the business; (3)

---

<sup>2</sup>This amount includes tax, interest and penalties.

petitioner did not willfully fail to collect and remit sales and withholding tax; (4) the Division has improperly asserted that petitioner is liable for penalties and interest with respect to the alleged unpaid sales tax; and (5) reasonable cause requires the cancellation of all penalties.

5. Petitioner is a certified public accountant who has been employed in the accounting field since 1969. During the periods in issue, he was a member of the accounting firm of Goodfriend and Borden.

6. Petitioner performed, inter alia, comprehensive bookkeeping services, corporate tax planning and preparation, certified audit functions, and the filing of tax returns for clients since at least 1980, including performing various degrees of accounting services for 20 to 30 restaurants during the years 1988 through 1990.

7. According to petitioner, he first met Marvin Paige in the late 1970's. At that time, Mr. Paige was actively involved in the restaurant business in New York City. Subsequently, petitioner performed accounting work for a Key West, Florida restaurant which Mr. Paige had opened.

8. Prior to the years in issue, Mr. Paige was actively involved with numerous New York City restaurants as, inter alia, a manager or as a consultant.

9. Prior to the periods in issue, petitioner owned stock in three corporations which ran restaurants in New York City -- Claire and two Hamburger Harry's. Marvin Paige was involved in all three of these corporations/restaurants. Petitioner was an officer of the corporation which ran Claire. He also performed accounting work for all three restaurants. Petitioner did not have an ownership interest in any of the other 20-plus restaurants which were owned by his accounting firm's clients.

10. According to petitioner, at some point in 1988, he was approached by Mr. Paige with the concept of a "Claire type" seafood restaurant to be located someplace on the upper west side of Manhattan. Mr. Paige wanted petitioner to solicit his accounting clients as potential investors.

11. On April 23, 1987, 55 Third Ave. Rest. Corp. was incorporated in New York State. On September 30, 1988, 55 Third Ave. Rest. Corp.'s certificate of incorporation was amended to change the corporation's name to "305 Rest. Corp." (the "corporation"). The certificate of amendment was executed by Steven Borden, as vice president, and petitioner, as secretary.

12. During the periods in issue, the corporation operated a restaurant called "MAX" located in the lobby of the Hotel Esplanade, 305 West End Avenue, New York, New York. MAX was a seafood grill, which opened for business in either May or June of 1989. The seating capacity of MAX was approximately 150 to 180 people.

13. Petitioner was one of three original shareholders of the corporation, owning 112 shares. The other two original shareholders were Marvin Paige and Steven Borden.<sup>3</sup> Petitioner's initial investment in the corporation was \$5,000.00.

14. Throughout the periods in issue, petitioner was secretary - treasurer of the corporation.

15. The other corporate officers were: Marvin Paige, president, and Steven Borden, vice president.

16. Petitioner was a member of the board of directors of the corporation, along with Messrs. Paige and Borden.

17. According to petitioner, at some point in 1988, a law firm prepared an offering circular in which it was stated that Mr. Paige "was going to actively maintain the restaurant and if anything ever happened to him, that the restaurant was in jeopardy of failing" (tr., p. 70). Petitioner did not submit a copy of this circular into the record.

18. Prior to MAX's opening, Marvin Paige's role was to:

"oversee construction, oversee whatever was built as far as inside, ordering all the kitchen equipment, staffing the restaurant, hiring all the employees, setting up menus, what would be in the restaurant and basically ordering whatever was necessary to get the restaurant functioning." (Tr., p. 57.)

---

<sup>3</sup>Marvin Paige was the major shareholder of the corporation, owning 240 shares, while Steven Borden owned 112 shares.

19. Petitioner described his role in late 1988 and the beginning of 1989, prior to MAX's opening, as one of:

"raising money, putting together an investment deal, in effect, to get him [Mr. Paige] the money to open the restaurant. I was also working with the consultant with the liquor license, reviewing all the papers that had to be filed with the Liquor Authority, all the questionnaires and all the various stockholders. I was working on all corporate set up, have the Subchapter S approved, to file for a Sales Tax I.D. Number for employment insurance, Federal ID numbers, that's basically it." (Tr., p. 71.)

Petitioner also stated that part of his function at that time was to do the accounting and auditing work and to protect his "investors' client's" money (tr., p. 57). He explained that to mean that he "would at the beginning oversee various controls of the restaurant and make sure that monies coming in for construction and everything else were done in a proper manner and making sure that he [Mr. Paige] did what he [Mr. Paige] was supposed to do" (tr., p. 57).

20. In December 1988, the corporation was in the process of applying for a liquor license from the State Liquor Authority ("SLA"). In connection with that application, petitioner executed, on December 19, 1988, inter alia, a "Personal Questionnaire" ("questionnaire") which included information about the interest(s)/position(s) petitioner was to hold in the corporation, as well as interests which petitioner held in other entities which held liquor licenses. Review of this questionnaire reveals that petitioner was to take an active role in the financial management of the corporation.

21. Petitioner, as well as Messrs. Paige and Borden, had check signing authority on behalf of the corporation. Petitioner signed checks on behalf of the corporation, including payroll checks. He was also able to and did transfer funds between the corporation's checking accounts.

22. It appears that the corporation had at least three checking accounts, one at Chemical Bank and two at State Bank of Westchester ("SBW"). The Chemical Bank checking account was used for payment of expenses related to the day-to-day operations of MAX, including advertising and the acquisition of products, food, and beverages, both alcoholic and nonalcoholic. One of the SBW checking accounts was used for, inter alia, the payment of taxes,

rent, salaries, insurance and utilities; while the other SBW checking account was used for payroll.

23. MAX employed Joe Lippi as its bookkeeper. Mr. Lippi's job was to enter all invoices into the corporation's books<sup>4</sup> as they came in and to prepare all bills and checks for payment of bills.

24. The corporation employed petitioner's accounting firm as its outside accountants.

25. The corporation's General Business Corporation Franchise Tax Return (Form CT-4) for 1988 reflects petitioner's signature as both an officer and as the preparer of such report. Attached to the Form CT-4 is an unsigned copy of the corporation's 1988 Form 1120, U.S. Corporation Income Tax Return. Schedule E of the Form 1120, entitled "Compensation of Officers", contains, inter alia, the names of each corporate officer, the percentage of time each officer devoted to the business and the amount of compensation each officer received. Review of Schedule E reveals that in 1988 petitioner devoted 20% of his time to the business, while Messrs. Paige and Borden devoted 25% and 10% of their time, respectively, to the business. According to the schedule, none of the officers received any compensation.

26. On February 8, 1989, petitioner, as secretary/treasurer, executed Form CT-6, Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes ("Sub S election form"). This Sub S election form contains the following information concerning the corporation: its address was listed as 305 West End Avenue, New York, New York and its principal business activity was a restaurant; there were 800 shares of stock issued and outstanding, which were held by a total of 17 shareholders; petitioner and Messrs. Paige and Borden held a total of 464 shares.<sup>5</sup> The remaining 14 individuals held shares in various amounts. The Federal election to be treated as a subchapter S corporation was "applied for" on January 1, 1989. The election for New York

---

<sup>4</sup>It appears that MAX had some sort of computer system in place for handling some of its financial record-keeping.

<sup>5</sup>As noted in Finding of Fact "13", Marvin Paige held 240 shares, while petitioner and Steven Borden each held 112 shares.

purposes was "to become effective for the period beginning January 1, 1989 and ending December 31, 1989". All 17 shareholders signed the form.

27. Included in the record are copies of SBW bank statements for the corporation's checking account number 10105930. These bank statements are addressed to the corporation in care of Goodfriend & Borden, 35 E. Grassy Sprain Road, Yonkers, NY 10710.

28. On March 29, 1990, the corporation's workers compensation renewal policy, dated December 9, 1989, was sent to petitioner at his Yonkers, New York office.

29. According to petitioner, Marvin Paige along with MAX's manager and a fellow stockholder, David Poisal, took care of the daily operations of the restaurant.

30. Once MAX opened, petitioner visited it very little, "aside from eating there a couple of times a month with family and friends" (tr., p. 87).

31. Most of the corporation's records were kept at Claire Restaurant, not at MAX.

32. Once a week, usually on Wednesday, petitioner would go to Claire to perform its bookkeeping functions, as well as those of MAX. During his visit, petitioner would review the bills, and the attached invoices and checks to make sure that the checks matched the invoices and that the invoices were prepared correctly. He sometimes signed the checks after reviewing the bills. He "would also prepare any tax returns that were due, meaning sales tax, any withholding or payroll taxes along that line to go out" and he "might write the check out physically" (tr., p. 89). After he completed his review, he returned the checks clipped to the invoices and the majority of the tax returns with attached checks to the bookkeeper.

Petitioner estimated that out of a full year, he was at Claire about 30 or 36 weeks, usually two or three times a month. His visit usually included lunch.

33. Accounting work on behalf of the corporation was also performed at petitioner's accounting office by him, Mr. Borden or one of the accounting firm's staff members.

34. Some of the tax returns were paid through petitioner's office.

35. Petitioner did not keep track of billable hours and did not bill the corporation for accounting work which he performed on its behalf. In 1989, he and Mr. Borden each received a



salary of approximately \$12,000.00 from the corporation. According to petitioner, these salaries were paid for the accounting services which both he and Mr. Borden rendered to the corporation.

36. The accounting firm prepared the corporation's sales tax returns, corporate tax returns and payroll tax returns -- both Federal and State.

37. At the end of 1989, the corporation had 14 shareholders including petitioner.

38. The record includes an S Corporation Information Return ("Form CT-3-S") for 1989 and an attached 1989 Federal Form 1120S for the corporation, together with the accompanying Schedules K-1 for the corporation's 14 shareholders, including petitioner. The 1989 Form 1120S shows an ordinary loss of \$209,379.00, with petitioner receiving \$35,594.00 as his distributive share of such ordinary loss. Compensation of officers was reported as \$48,000.00 on the 1989 Form 1120S.

Review of the 1989 Form CT-3-S reveals that petitioner signed this return as preparer on March 26, 1990. It is also noted that he was listed as the tax matters person ("TMP") on the Form 1120S.

39. The record also includes the same forms for 1990, which reflect an ordinary loss of \$212,662.00, with petitioner receiving \$36,153.00 as his distributive share thereof. The corporation did not report any compensation for its officers on the 1990 Form 1120S.

Review of the 1990 Form CT-3-S reveals that petitioner signed it as preparer on September 10, 1991. He was listed as the TMP on the 1990 Form 1120S.

40. MAX ceased operating as a restaurant sometime in August of 1990. When asked why MAX failed, petitioner responded that the location turned out to be horrible. The restaurant failed because it did not establish itself as a neighborhood restaurant.

41. Petitioner did not submit the Articles of Incorporation or minutes of any meeting of the corporation into the record.

42. At the outset of the hearing, Administrative Law Judge Maloney stated that she was the Administrative Law Judge assigned to hear the Matter of Marvin Paige, officer of 305

Restaurant Corp. at which point petitioner's representative made a motion to recuse Judge Maloney pursuant to 20 NYCRR 3000(8)(a) on the ground that Judge Maloney had heard the Paige matter and as a result might have preconceived knowledge concerning petitioner's case. Chief Administrative Law Judge Andrew F. Marchese denied Mr. Flynn's motion and Judge Maloney heard this matter.

43. The Division submitted eleven proposed findings of fact. In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been incorporated in these Findings of Fact except numbers 2, 5, 6, 10 and 11 which have been modified to more accurately reflect the record.

44. Petitioner has submitted one lengthy finding of fact in narrative form. In accordance with State Administrative Procedure Act § 307(1), all the statements have been incorporated into the Findings of Fact except for those not supported by the record, or those not relevant to this matter.

#### ***SUMMARY OF THE PARTIES' POSITIONS***

45. Petitioner contends that the Division of Tax Appeals erred in denying his representative's motion for recusal of Judge Maloney. He asserts that:

"fundamental fairness and the avoidance of even the appearance of partiality requires that a taxpayer's hearing be held before an Administrative Law Judge who does not have prior knowledge of the facts, or the alleged facts, in the taxpayer's case" (Petitioner's brief, p. 14.)

Petitioner contends that Chief Administrative Law Judge Marchese's decision should be reversed. He also contends that the Division erred in determining that he was a responsible person under the Tax Law for the sales and withholding taxes of MAX. He argues that he did not take an active role in MAX nor did he control its financial affairs. Petitioner claims that he was only the accountant for the business, as well as an investor. He maintains that Marvin Paige "had unyielding and total control over all the financial matters" of MAX, and that Mr. Paige "had the initial and ultimate say regarding when, where, and how the funds of the business would be spent" (Petitioner's brief, pp. 17 - 18). Petitioner requests that the notices of deficiency and determination issued by the Division be canceled.

46. The Division asserts that the ruling of Chief Administrative Law Judge Marchese was correct and consistent with the regulations of the Division of Tax Appeals. It also contends that the facts in the record clearly establish that petitioner was a responsible officer of the corporation for both sales and withholding taxes during the periods in issue. It argues that petitioner, a certified public accountant, had the ability to control the affairs of the corporation. The Division argues that petitioner was actively involved in the management of the corporation, along with Mr. Paige. It claims that the record clearly shows that Mr. Paige handled the restaurant portion of the business while petitioner handled the financial end. The Division further argues that there may be more than one responsible officer. Furthermore, it asserts that both petitioner and Marvin Paige were responsible officers. The Division requests that the petition be denied and that the assessments be sustained in full.

47. In his reply brief, petitioner argues that the record clearly establishes that he did not have the duty, authority or responsibility to act on behalf of MAX in connection with its everyday business activities and its sales and withholding taxes. He claims that he did not defer to Mr. Paige in an effort to shield himself from liability. Rather, petitioner maintains that the facts in the record prove that he was unqualified to run a restaurant and did not participate in the daily management and financial operations of MAX. Petitioner contends that he is not personally liable for the sales and withholding taxes at issue and therefore his petition should be granted.

### ***CONCLUSIONS OF LAW***

A. As noted in Finding of Fact "42", petitioner's representative made a motion for recusal to Chief Administrative Law Judge Marchese which motion was denied. Petitioner maintains that the motion for recusal should be reconsidered and granted. Under 20 NYCRR 3000.8(a), the only person to whom a motion to recuse may be made is the supervising administrative law judge. There is no authority given to an administrative law judge to reverse a denial of such a motion. The appropriate forum to address this issue is the Tax Appeals Tribunal on exception.

B. Tax Law § 1133(a) states that:

"every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article . . . ."

Tax Law § 1131(1) defines a "person required to collect any tax imposed by [Article 28]" to include:

"any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership . . . or any employee of an individual proprietorship who as such officer, director [or] employee . . . is under a duty to act for such corporation, partnership . . . or individual proprietorship in complying with any requirement of this article; and any member of a partnership . . . ."

C. It has been held that corporate office does not, per se, impose sales tax liability upon an officeholder (see, Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427; Matter of Unger, Tax Appeals Tribunal, March 24, 1994, confirmed 214 AD2d 857, 625 NYS2d 343, lv denied 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is a responsible officer must be determined based upon the particular facts of each case (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State, 82 Misc 2d 181, 368 NYS2d 448; Chevlowe v. Koerner, supra, 407 NYS2d at 429; Matter of Hall, Tax Appeals Tribunal, March 22, 1990, confirmed 176 AD2d 1006, 574 NYS2d 862; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, confirmed 162 AD2d 890, 558 NYS2d 239; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). Factors stated by the Division's regulations are: whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

The Tax Appeals Tribunal, in Matter of Constantino (Tax Appeals Tribunal, September 27, 1990), stated:

"[T]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the

corporation; the individual's economic interest in the corporation (Cohen v. State Tax Commn., *supra*, 513 NYS2d 564, 565; Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., *supra*, 413 NYS2d 862, 865; Chevlowe v. Koerner, *supra*, 407 NYS2d 427, 429; Matter of William D. Barton, [Tax Appeals Tribunal, July 20, 1989]; Matter of William F. Martin, *supra*; Matter of Autex Corp., *supra*)."

D. Petitioner admits that he was an officer, a member of the board of directors and the holder of 112 shares of the corporation's stock during the periods in issue. However, he contends that "he did not control the financial affairs of MAX, and did not have the duty, authority or responsibility to insure that its sales and withholding taxes would be paid" (Petitioner's reply letter, p. 3). He asserts that he did not have either the time or the expertise necessary to run a restaurant. Furthermore, petitioner contends that the record clearly establishes that he (1) had no control over the daily financial or business affairs of MAX; (2) did not hire or fire MAX employees or participate in any way in the restaurant's management; (3) did not collect, deposit or account for MAX's daily receipts; (4) did not perform bookkeeping services for MAX; (5) "only visited the restaurant for a short period of time every couple of weeks to have lunch and provide accounting services to MAX"; and (6) did not sign or file tax returns on behalf of the corporation for the periods in issue. He maintains that Marvin Paige, president of the corporation, is the officer personally responsible for the sales tax liability due. Petitioner argues that Mr. Paige exercised complete control over all matters concerning MAX including financial ones and that Mr. Paige had the initial and ultimate say regarding when, where and how the funds of the business would be spent. He contends that Mr. Paige's control over the corporation's finances included control over whether or not to pay the sales and withholding taxes.

Petitioner's arguments are without merit. He satisfies a significant number of the criteria used in determining whether an individual is a responsible officer of a corporation. Petitioner was secretary-treasurer, a member of the board of directors and an authorized signatory on the corporation's checking accounts (*see*, Findings of Fact "14"; "16" and "21"). In fact, he transferred funds between checking accounts, in addition to signing checks on behalf of the

corporation (see, Finding of Fact "21"). In 1989, petitioner received a salary from the corporation (see, Findings of Fact "35" and "38"). In addition, he derived economic benefit from his stock ownership by the pass-through of the S corporation's ordinary losses (see, Findings of Fact "38" and "39").

Petitioner claims that for the periods in issue he was only the accountant for the corporation, performing accounting services every couple of weeks, which mainly consisted of the preparation of the corporation's various Federal and State tax returns. He asserts that he never took an active role in the day-to-day financial or business affairs of MAX. Petitioner was a certified public accountant, who had knowledge of the running of restaurants, having performed accounting services for 20-plus restaurants in the New York City area (see, Finding of Fact "6"). In addition, prior to his investment in the corporation, he had an ownership interest in three other corporate entities which operated restaurants in the New York City area (see, Finding of Fact "9"). There is no evidence in the record to show that petitioner's authority as secretary-treasurer was restricted in any way. Indeed, the record shows that petitioner executed documents which stated that he was taking an active role in the financial management of the corporation (see, Finding of Fact "20"). While Mr. Paige may well have had responsibility for the day-to-day running of the restaurant, it is clear that petitioner was responsible for the financial aspects of the corporation. The record clearly shows that petitioner reviewed the books and records of the corporation on a regular basis and transferred funds between the corporation's various checking accounts (see, Findings of Fact "21" and "32"). In addition, some of the corporation's business documents were sent to petitioner directly at his accounting office (see, Finding of Fact "27" and "28"). The division of responsibilities among petitioner, Mr. Paige and Mr. Borden does not establish that petitioner is not a person required to collect taxes (Matter of Kropf, Tax Appeals Tribunal, March 21, 1991; Matter of Waite, Tax Appeals Tribunal, January 12, 1995, confirmed \_\_ AD2d \_\_, 639 NYS2d 584).

Petitioner contends that Mr. Paige is the responsible officer in this matter. However, more than one person can be held liable as a responsible officer under the statute (Matter of

LaPenna, Tax Appeals Tribunal, March 14, 1991; see, Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536). The fact that petitioner failed to exercise his responsibility is irrelevant.

The evidence in this case supports the conclusion that, during the periods in issue, petitioner had or could have had sufficient authority and control over corporate affairs and therefore was under a duty to act for the corporation in complying with articles 28 and 29 of the Tax Law (Matter of Pais, Tax Appeals Tribunal, July 18, 1991).

E. Conclusion of Law "C" summarizes the factors which are considered relevant in determining whether an individual is responsible for sales and use taxes from a corporation.

Section 685(g) of the Tax Law provides:

"Willful failure to collect or pay over tax. -- Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Tax Law § 685(former[n]), in turn, furnishes the following definition of "persons" subject to the section 685(g) penalty:

"[T]he term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

F. The question of whether someone is a "person" under a duty to collect and pay over withholding taxes is a factual one, similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. Factors which should be considered are, inter alia, whether the particular individual signed tax returns, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186; see, Matter of MacLean v. State Tax Commn., 69 AD2d 951, 415 NYS2d 492, 494, affd 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his authority to pay corporate obligations (Matter of Amengual v. State Tax Commn., 95 AD2d

949, 464 NYS2d 272; see, Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799).

G. Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had or could have had sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (Matter of Constantino, *supra*; Matter of Chin, Tax Appeals Tribunal, December 20, 1990). Furthermore, in the withholding tax situation, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in Tax Law § 685(g). More is required. As the Court of Appeals indicated in Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623), the test is:

"whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes . . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required" (*id.*, 396 NYS2d at 624-625; see, Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

It is equally true that "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge" (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301).

H. The burden of proof is on the taxpayer to prove that a tax assessment is improper (Tax Law § 689[e]). Petitioner asserts that he was only the accountant for the corporation who stopped into the restaurant every few weeks for a couple of hours to have lunch and to render accounting services to the corporation. He asserts that Marvin Paige exercised complete dominion and control over all aspects of the running of MAX, including the financial aspects of the business, which included the payment of all taxes. Petitioner argues that the record clearly



shows that Mr. Paige did not allow him, or any of the investors in MAX to determine the priority for payment of MAX's bills, including its taxes.

It is clear from the record that petitioner was a person under a duty to collect and remit the withholding taxes at issue. Petitioner was a certified public accountant, who, during the periods in issue, performed accounting services for 20-plus restaurants. He was secretary-treasurer of the corporation and was one of the three largest shareholders. There is no evidence in the record which indicates that there were any restrictions on his authority to act on behalf of the corporation. It is clear from the record that, contrary to petitioner's assertions, he had knowledge of the corporation's day-to-day financial affairs. Petitioner received the bank statements from at least one of the corporation's checking accounts at his accounting office (see, Finding of Fact "27"). He also transferred funds between the various checking accounts and signed checks (see, Finding of Fact "21"). Petitioner reviewed the corporation's books and records on a regular basis to prepare the corporation's tax returns. In addition, he was designated as the tax matters person on the Forms 1120 which he prepared on behalf of the corporation (see, Findings of Fact "32", "38" and "39"). Also, some of the taxes were paid through petitioner's office (see, Finding of Fact "34"). It is clear that there were no restrictions on petitioner's ability to perform his duties.

Petitioner has failed to sustain his burden of proving that he was not a responsible person under Tax Law § 685(n).

I. I will next address the issue of whether petitioner's failure to collect and pay over such tax was willful within the meaning of Tax Law § 685(g). The fact that one is determined to be a responsible officer does not necessarily mean that the person is liable for the taxes in issue (see, e.g., Reyers v. New York State Tax Commn, 116 AD2d 880, 498 NYS2d 199; Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

The crux of the willfulness standard "is that the person must voluntarily and consciously direct the trust monies from the State to someone else" (Matter of Gallo, Tax Appeals Tribunal, September 9, 1988). Therefore, a lack of knowledge that withholding taxes were not being paid

over might negate a finding of willfulness (Matter of Gallo, supra; Matter of Flax, Tax Appeals Tribunal, September 9, 1988; Matter of Lyon, supra). Nevertheless, if a responsible officer disregards his corporate responsibility to see that taxes are paid, the conduct can be willful despite a lack of actual knowledge (Matter of Gallo, supra; Matter of Lyon, supra).

Thus, the principle has been developed that a reckless disregard of corporate responsibilities can constitute willful conduct. It is an appropriate equivalence that a person responsible to collect tax should not be able to insulate himself from liability by abandoning his responsibilities. However, it can be found that, under certain circumstances, such a person can make an appropriate delegation of authority sufficient to release him from the responsibilities of a person under a duty to act (see, Matter of Lyon, supra). This would require the responsible person to make a reasonable delegation of authority, exercise reasonable supervision over the delegate and reasonably rely on the information requested of and provided by the delegate (Matter of Gallo, supra).

J. I find that petitioner did not prove that he, as a responsible person, made a reasonable delegation of authority to ensure that the withholding taxes were paid for the periods in issue. Petitioner has attempted to place responsibility upon Mr. Paige. Petitioner has argued that he had neither the time nor the talent to run MAX and that Marvin Paige, an experienced restaurateur, was the officer solely responsible for all aspects of the business including the payment of taxes. He also contended that Mr. Paige decided which bills were to be paid, including sales and withholding taxes. There is no evidence in the record to support petitioner's assertions that a division of responsibilities actually existed. Even if petitioner did in fact delegate the responsibility to ensure that the withholding taxes were paid by Mr. Paige, petitioner has not demonstrated that this was a reasonable delegation of authority. Petitioner had extensive knowledge of and both personal and professional experience with the financial aspects of corporations which operated restaurants (see, Finding of Fact "6" and "9"). Indeed, petitioner, as a certified public accountant, should have been aware of the fact that withholding taxes must be paid. A responsible person cannot insulate himself from liability by disregarding

his duty and leaving it to someone else to discharge (Matter of Capoccia, 105 AD2d 528, 481 NYS2d 476; Matter of Ragonesi, supra). For the periods in issue, petitioner is liable under Tax Law § 685(g).

K. The petition of Irwin Goodfriend is denied; the two notices of deficiency, dated August 5, 1993 and the four notices of determination, dated August 5, 1993, are sustained.

DATED: Troy, New York  
January 23, 1997

/s/ Winifred M. Maloney  
ADMINISTRATIVE LAW JUDGE